

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 24066-5-III

Respondent,

Division Three

v.

RUSSELL F. STENGER,

UNPUBLISHED OPINION

Appellant.

SWEENEY, C.J.—To show ineffective assistance of counsel, a defendant must show both deficient representation and prejudice. Here, Russell F. Stenger complains that he was ineffectively represented because his lawyer did not hire an expert to support his claim of diminished capacity. But he has failed to affirmatively show either deficient representation or prejudice. And he has not, therefore, overcome the presumption that he was effectively represented. We therefore affirm his conviction.

FACTS

Russell F. Stenger was sentenced to life at the Walla Walla penitentiary in 1988. The State charged him with custodial assault for attacking a prison guard in 2004. Before

trial, defense counsel told the court that Mr. Stenger was not willing to waive his speedy trial rights and that the speedy trial period would expire in 10 days. Counsel said she needed time to explore two defenses before trial, including diminished capacity.

The court suggested that Mr. Stenger waive his speedy trial rights so his lawyer could pursue the diminished capacity defense. The court adjourned the hearing after telling Mr. Stenger and his counsel to decide whether or not to seek a continuance for further defense preparation. Mr. Stenger signed a waiver until March 29, 2004. And the trial started on March 29.

Mr. Stenger testified that he remembered seeing the prison guard sitting in her office. And the next thing he knew officers were taking him down. He had no memory of any interaction with the officer and no physical contact. He said he never had any intent to harm her. He found out what had happened the following day. He testified that he had a history of blacking out and had ongoing memory problems. He said a magnetic resonance imaging (MRI) showed four brain abnormalities, which he had been told likely were caused by an incurable degenerative brain disease.

The jury found Mr. Stenger guilty. He was sentenced to 16 months to be served consecutively to his current sentence. He appeals.

DISCUSSION

Mr. Stenger argues that he was denied effective assistance of counsel because his lawyer failed to hire an expert to bolster his diminished capacity defense.

The State responds that Mr. Stenger waived his right to speedy trial and he had then an extra 39 days to investigate and develop this defense. But for reasons that were not placed on the record, and were not required to be placed on the record, his lawyer did not hire an expert.

Our strong presumption is that Mr. Stenger was effectively represented. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). Mr. Stenger must show that his lawyer's representation fell below an objective standard of reasonableness based on consideration of all the circumstances. And he must show a reasonable probability that, except for counsel's unprofessional errors, the result of this proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

We apply "a heavy measure of deference to counsel's judgments" in the matter of investigating possible mental impairment defenses. *Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). And the decision to call witnesses is strictly a matter of trial tactics and does not support a claim of ineffective assistance of counsel. *State v. Early*, 70 Wn. App. 452, 461, 853 P.2d 964 (1993).

Here, it is only with the rankest sort of speculation that we could conclude that (1)

diminished capacity was a viable defense, or (2) an expert would have supported that theory. There is nothing in this record to suggest that any expert would have supported Mr. Stenger's suggestion at trial that he suffered from diminished capacity. There was no attempt to develop the defense with lay witnesses who may have known Mr. Stenger.

The reasonable assumption here is that counsel decided the defense was not viable. That is a legitimate trial strategy.

Additional Grounds

Mr. Stenger contends that during pretrial proceedings he wanted to argue that the underlying sentence on which he was confined based on previous convictions was invalid because of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The trial court did not address the merits of this issue. It was one of six motions filed pro se by Mr. Stenger that the court rejected because he was represented by counsel.

Mr. Stenger does not have a viable *Blakely* issue. *Blakely* does not apply retroactively to cases that were final when *Blakely* was announced. *State v. Evans*, 154 Wn.2d 438, 448, 114 P.3d 627, *cert. denied*, 126 S. Ct. 560 (2005). Mr. Stenger's case was final in 1988.

We affirm the conviction.

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A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Sweeney, C.J.

WE CONCUR:

Schultheis, J.

Kato, J.